STATE OF MICHIGAN

IN THE SUPREME COURT

KIRT BIERLEIN, Conservator for
SAMANTHA C. BIERLEIN, a Minor,
and NORMA R. BIERLEIN, as Next Friend
of SAMANTHA C. BIERLEIN, a Minor,

Plaintiffs/Appellants,

vs.

Supreme Court Docket No: 128913
Court of Appeals Docket No: 259519
Lower Court Case No: 96-013292-NI

MARK SCHNEIDER and MARY
SCHNEIDER, Jointly and Severally,

Defendants/Appellees.
_____/

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BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL
BY
DEFENDANTS/APPELLEES

D8913

PROOF OF SERVICE

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STATEMENT IDENTIFYING ORDER APPEALED FROM

Plaintiffs/Appellants seek leave to appeal from the trial court's November 15, 2004 "Order Reinstating Dismissal Pursuant to Court of Appeals Opinion and Denying Plaintiff's motion for Enforcement of Settlement."

COUNTER-STATEMENT OF QUESTIONS INVOLVED

QUESTION I

IS THE ISSUED RAISED BY THIS APPEAL BARRED BY THE LAW OF THE CASE DOCTRINE?

Defendants/Appellees answer this question "Yes."

Plaintiffs/Appellants answers this question "No."

QUESTION II

WERE THE PLAINTIFFS ENTITLED TO AN ORDER COMPELLING THE DEFENDANTS TO PAY THE SETTLEMENT AMOUNT A SECOND TIME, WHERE (1) PLAINTIFFS' MOTION FOR RELIEF WAS FILED BEYOND THE ONE YEAR PERIOD OF TIME ALLOWED BY MCR 2.612(C)(2, AND WAS THEREFORE UNTIMELY, (2) THE DEFENDANTS' RIGHTS WOULD BE DETRIMENTALLY EFFECTED IF THE ORIGINAL SATISFACTION OF THE SETTLEMENT WAS SET ASIDE, AND (3) THE PLAINTIFFS CANNOT MEET THE REQUIREMENTS NECESSARY FOR APPLICATION OF MCR 2.612(C)(1)(f.

Defendants/Appellees answer this question "No."

Plaintiffs/Appellants answers this question "Yes."

The trial court answered this question "No."

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Introduction

This is the second time the plaintiff has appealed this matter. The first appeal was Court of Appeals Docket # 242547 (hereafter referred to as "Bierlein I"), and involved the same issue as is involved in the instant appeal. As stated in the Court of Appeals' order granting leave to appeal in Bierlein I, one of the issues in that appeal was what relief, if any, should be granted if there was a violation of MCR 2.420(B)(4). (See Exhibit V). Indeed, the Court of Appeals specifically directed the parties to brief that issue in Bierlein I. In Bierlein I, the Plaintiff simply took the position that the appropriate relief was to completely vacate the settlement (a settlement which the Defendants had already paid) and reinstate the case, and did not offer the Court of Appeals any other alternate form of relief. The Plaintiff never claimed (as she now claims) that one form of relief would be to compel the Defendants to pay the settlement a second time. Bierlein I was resolved in an opinion issued by the Court of Appeals on January 20, 2004, in which the Court of Appeals rejected the relief sought by the Plaintiff. In the instant appeal, the Plaintiffs/Appellants again asked the Court of Appeals (and now asks this Court) to address what relief should be granted if there was a violation of MCR 2.420(B)(4). The only difference between the instant appeal and Bierlein I is the relief sought by the Plaintiffs/Appellants. The Plaintiffs/Appellants now claim that the appropriate relief would be to compel the Defendants to pay the settlement again. As will be discussed below, the Plaintiffs/Appellants had a full opportunity to brief this issue in Bierlein I, and indeed all parties were directed to brief the issue relating to the appropriate relief (if any). Instead, the Plaintiffs chose to litigate this issue on a piecemeal basis. Having failed to raise this theory in Bierlein I, the Plaintiffs should not be allowed to raise this issue now. Nonetheless, as will also be discussed in the

Argument section of this Brief, in Bierlein I the Court of Appeals specifically rejected as unfair the relief now requested by the Plaintiffs/Appellants.

B. Chronology of Bierlein I

This is a personal injury lawsuit, arising out of an automobile accident which occurred on May 31, 1995. The minor-plaintiff, Samantha C. Bierlein brought suit through her Next Friend, Norma Bierlein. This case was ultimately settled for the amount of $55,000.00 which was approved by the trial court on July 28, 1997. On June 21, 2002, the trial court entered an order re-opening the settlement for re-evaluation, after it became apparent that Plaintiff's counsel never turned over the settlement proceeds to the Plaintiff, and apparently stole those settlement proceeds. Defendants appealed from the lower court order which reopened the settlement of this matter.

As noted above, this matter was settled for the total amount of $55,000.00, in July, 1997. On July 28, 1997, the parties appeared in Saginaw County Circuit Court in order to obtain court approval of the settlement (Exhibit A). Honorable Peter Meter was the presiding judge. Norma Bierlein, the Plaintiff's mother and Next Friend, gave testimony in support of the settlement (Exhibit A, pp 3-10). Judge Meter was given a copy of medical reports regarding the minor-plaintiff's condition, including reports from the minor-plaintiff's speech therapist. (Exhibit A, pp. 8-9, 10). The nature of the child's past medical treatment was placed on the record (Exhibit A, pp. 4-6). Judge Meter specifically asked the child's mother whether any of the child's injuries were still visible, to which Ms. Bierlein replied that the child had a two inch scar on the left side of her scalp which was covered by her hair (Exhibit A, p. 8). During the questioning of Norma Bierlein, Judge Meter specifically inquired into the minor-child's speaking and thinking abilities (Exhibit A, pp. 8-10).

During the July 28, 1997 proceeding, defense counsel showed Ms. Bierlein a copy of the Release of All Claims, which she had signed. She agreed that the Release bore her signature, and

she further agreed that signed the Release of her own free will. (Exhibit A, p. 7). Ms. Bierlein testified that she understood that by signing the Release she was releasing the Defendants of any liability. (Exhibit A, p. 3). Ms. Bierlein also testified that she felt that the settlement was in the best interests of her daughter (Exhibit A, p. 8).

At the conclusion of the hearing, the court approved the settlement, and signed and entered the Order Approving Settlement. (Exhibit A, p. 11). A copy of the July 28, 1997 Order Approving Settlement is attached to this Brief as Exhibit B. At the conclusion of the hearing, counsel for the Plaintiff stated that he had taken steps to have a Conservator appointed for the minor-child (Exhibit A, p. 11).

On the day of the motion hearing, Norma Bierlein signed a Release of All Claims. (Exhibit C). In that Release, Ms. Bierlein expressly represented that the $55,000 settlement amount had been "to me in hand paid and receipt of which is hereby acknowledged. . ." (Exhibit C, p. 1). A copy of the settlement draft, bearing an endorsement by Norma Bierlein is attached to this Brief as Exhibit D.

In approximately April of 2001, Plaintiff Norma Bierlein apparently advised the lower court that she never received the settlement proceeds from her counsel. Accordingly, the lower court scheduled a Show Cause Hearing for May 1, 2001, presided over by Honorable Fred L. Borchard, in order to inquire into the disposition of the settlement proceeds. (Exhibit E). Norma Bierlein and her counsel both appeared for that hearing. At that time, Ms. Bierlein advised the court that she had been trying to contact her attorney in order to determine where the settlement proceeds were. (Exhibit E, p. 2). The court observed that the file did not contain an Order of Distribution of the Settlement Proceeds, and that the Probate Court did not have a file on this matter. (Exhibit E, p. 4). Plaintiff's counsel stated that he had been trying to locate his file, unsuccessfully. (Exhibit E, p. 4). He further claimed that, in the past, he would use another firm in order to secure appointment of a

conservator. (Exhibit E, p. 4). Plaintiff's counsel claimed that he did not know what happened to the settlement proceeds. (Exhibit E, pp. 5-6).

Plaintiff's counsel asked the court to give him until the following Monday in order to report to the court. (Exhibit E, p. 8). The court granted this request. (Exhibit E, p. 8).

On May 7, 2001, the lower court conducted a Continued Show Cause Hearing regarding the location of the settlement proceedings. Once again, Honorable Fred L. Borchard presided over the proceedings, and Norma Bierlein and her counsel appeared for the hearing. During that hearing, Ms. Bierlein testified that a Conservator was never appointed for her minor-daughter, even though it had been her understanding that she could be appointed Conservator. (Exhibit F, 6). She further testified that when she signed the Release papers in the offices of her attorney, there was a check attached to the top. (Exhibit F, p. 6). She testified that her attorney told her that the proceeds would be deposited in a high interest bearing account, that she could not worry about it, and that he would take care of it. (Exhibit F, p. 7). She was not sure whether she had signed the settlement check. (Exhibit F, p. 7).

During the May 7, 2001 hearing, the court also asked Plaintiff's counsel to bring the court up-to-date regarding the current location of the settlement proceeds. In response, Plaintiff counsel claimed that he was taking steps to try and determine the current location of the proceeds. (Exhibit F, pp. 7-8). Plaintiff's counsel claimed that the settlement proceeds would have been sent to an investment firm, and that the person who would have been in charge of opening the account would have been an individual by the name of Rex Fitzgerald. (Exhibit F, pp. 8-9). Plaintiff's counsel also claimed that Mr. Fitzgerald was no longer in the phone book. (Exhibit F, p. 9). Plaintiff's counsel also claimed that he could not locate his file. (Exhibit F, p. 9). He stated that there had been some

water damage at the file storage location, and that it was necessary to destroy the stored files. (Exhibit F, p. 9).

The Court ultimately determined that a further show cause hearing should be conducted within 30 days. (Exhibit F, p. 18).

On May 10, 2001, the lower court issued an "Order Re-Opening Nunc Pro Tunc" re-opening this case. (Exhibit H). As of that date, the court did not set aside the settlement itself, but merely set aside the order of dismissal.

On May 17, 2001, the lower court issued an order appointing attorney David B. Meyer as the Guardian Ad Litem for the minor child, "for the purpose of an investigation concerning the settlement which occurred on July 28, 1997..." (Exhibit I). The order instructed Mr. Meyer to "prepare a report and recommendation concerning the settlement and the whereabouts of any proceeds from that settlement by June 17, 2001." (Exhibit I).

On June 6, 2001, the lower court conducted a Continued Show Cause Hearing regarding the whereabouts of the settlement proceeds. (Exhibit J). These proceedings were attended by attorneys Gerald V. Padilla and Timothy A. Dinan (attorneys for the Defendants), William A. Brisbois (an attorney who had been retained to represent Plaintiff's previous counsel), and Norma Bierlein. (Exhibit J). Mr. Brisbois advised the court that Mr. Collison, Plaintiff's previous counsel was incapacitated and would not be able to attend. (Exhibit J, p. 3). During the course of the hearing, the lower court placed on the record that Plaintiff's previous attorney ran his car into a tree at a high rate of speed after the last hearing. (Exhibit J, p. 10). The court further stated that there was an on-going criminal investigation by the Michigan State Police. (Exhibit J, p. 11).

A copy of the endorsed settlement draft was produced by defense counsel for purposes of the Show Cause Hearing. (Exhibit J, p. 12). Upon reviewing that copy, Ms. Bierlein stated that she did not believe that the endorsement on the check was in her handwriting. (Exhibit J, p. 12).

During the course of this hearing, the lower court particularly expressed its concern that this case had been dismissed before a Conservator had been appointed. (Exhibit J, pp. 15-16). The hearing was ultimately adjourned, pending receipt of the report and recommendation from the Guardian Ad Litem. (Exhibit J, p. 25).

On June 15, 2001, the Guardian Ad Litem issued his report and recommendation. (Exhibit K). In his report, the Guardian Ad Litem did not in any way suggest that the settlement should be further examined or set aside. (Exhibit K, p. 5).

On June 22, 2001, the Defendants filed a Motion for Re-Hearing or to Alter or Amend the court's Previous Order of May 10, 2001. (Exhibit L). On July 26, 2001, the lower court entered an Order denying Defendants' Motion for Re-Hearing or to Alter or Amend. (Exhibit M). The Order also provided, however, that steps must be taken for the appointment of a Conservator for the minor-child, and further that an Application must be made to the Michigan Client Protection Fund of the State Bar of Michigan (Exhibit M).

A Conservator was subsequently appointed on behalf of the minor-plaintiff. On March 5, 2002, the Conservator filed a Motion to Re-Open the Trial Court Proceedings and to Re-Evaluate the Settlement Terms. (Exhibit N). The Defendants opposed that motion. (Exhibit O). The lower court took the Conservator's motion under advisement and, on June 21, 2002, issued an Opinion and Order granting the Motion to Re-Open the Settlement Terms Proceedings. (Exhibit G).

These Defendants filed a timely Application for Leave to Appeal to the Court of Appeals. On October 25, 2002, the Court of Appeals issued an Order granting the Application for Leave to

Appeal. (Exhibit V). In that order, the Court of Appeals specifically directed the parties to address not only the issues raised in the Application for Leave to Appeal, but also "**what relief, if any, is appropriate in this matter.**" (Exhibit V)(emphasis added).

On January 20, 2004, the Court of Appeals issued an opinion ruling that the lower court had erred by setting aside the settlement, because the requirements of MCR 2.612(C)(1) were not met. Significantly, the Court of Appeals also ruled as follows:

> "**[D]efendants' rights would be detrimentally affected if the original satisfaction is set aside** since they relied on the court approved settlement for almost five years and have paid $55,000 to Samantha's next friend and attorney based on that court approval." (Exhibit Q, at p. 3)(emphasis added).

The Court of Appeals further noted that the result which the Plaintiffs now complain of were a result of the Plaintiff next friend's own actions:

> "The settlement here was on the record, the judge approved it, and the next friend agreed to the amount. Plaintiff was aware at that time that a conservator had not been appointed, and yet she still agreed to the settlement. When a party's own actions caused the result, courts are reluctant to grant that party relief under 2.612(C)(1)(f)." (Exhibit Q, at p. 3).

The Court of Appeals remanded this case to the lower court for proceedings consistent with the Court's opinion.

C. Post-Remand Proceedings

For more than seven months after the remand of this matter, the Plaintiffs made no claim that they were entitled to any further relief. Indeed, Plaintiffs made no such claims until after the Defendants filed a motion in the lower court to reinstate the dismissal of this case. (Exhibit R). On or about August 4, 2004, the Plaintiffs filed a "Motion to Enforce Settlement." (Exhibit S). Although designated as a motion to "enforce" the settlement, the Plaintiffs implicitly asked the

lower court to set aside Defendants previous satisfaction of the settlement. In their motion, the Plaintiffs requested that the lower court order the Defendants to once again pay the settlement amount, together with interest accruing since July 28, 1997. (Exhibit S).

After entertaining oral argument, the lower court granted Defendants motion to reinstate the dismissal, and denied Plaintiffs "Motion to Enforce Settlement." (Exhibit T).

Plaintiffs/Appellants sought leave to appeal from the Court of Appeals from the lower court's November 15, 2004 "Order Reinstating Dismissal Pursuant to Court of Appeals Opinion and Denying Plaintiff's motion for Enforcement of Settlement." On May 12, 2005, the Court of Appeals denied Plaintiff's application "for lack of merit in the grounds presented."

ARGUMENT I

THE ISSUED RAISED BY THIS APPEAL HAS ALREADY BEEN RESOLVED BY THIS COURT'S DECISION IN COURT OF APPEALS DOCKET # 242547, AND THEREFORE THIS APPEAL IS BARRED BY THE LAW OF THE CASE DOCTRINE.

A. Standard of Review

Whether the doctrine of law of the case applies is a question of law subject to de novo review. Ashker v. Ford Motor Co, 245 Mich.App 9, 13, 627 NW2d 1 (2001).

B. This Appeal Is Barred by the Law of the Case

As in the Court of Appeals, the "law of the case" doctrine dispenses with the need for this Court to consider legal questions decided by the Court of Appeals in an earleir appeal of this same case. As generally stated, the doctrine is that if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. CAF Investment Co. v. Saginaw Twp., 410 Mich. 428, 454, 302 N.W.2d 164 (1981). The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. Ashker ex rel. Estate of Ashker v. Ford Motor Co., 245 Mich.App. 9, 13, 627 N.W.2d 1, 3 (2001); Bennett v. Bennett, 197 Mich.App. 497, 499-500, 496 N.W.2d 353 (1992). The doctrine applies where a subsequent proceeding involves the same set of facts, the same parties, and the same question of law as the previous appeal. Manistee v Manistee Firefighters Ass'n, 174 Mich.App 118, 125, 435 NW2d 778 (1989).

These principles are directly applicable to this case. Not only does the instant case involve the precisely the same facts and the same parties as Bierlein I, but also this case involves the same issue of law. The alleged misconduct which was the subject of Bierlein I is precisely the same alleged misconduct which is the subject of this appeal, i.e., paying the settlement proceeds to Plaintiff minor's next friend and attorney prior to the appointment of a conservator. Moreover, when the Court of Appeals granted leave to appeal in Bierlein I, it specifically directed all of the parties (not merely the Defendants) to address not only the issues raised in the Application for Leave to Appeal, but also "what relief, if any, is appropriate in this matter." (Exhibit V). Given the Court of Appeals' explicit directive, the Plaintiffs did not have the option to strategically hold some of their theories of relief in reserve, and litigate those theories on a piece-meal basis in successive appeals. Rather, the Plaintiffs had an obligation to the Court of Appeals to present all of their arguments in a thorough fashion, even if this meant presenting those arguments as alternative theories of relief. The Plaintiffs have not, and cannot, explain why their current theory of relief could not have been presented during Bierlein I, as the Court of Appeals directed. Having failed to raise this theory of relief in Bierlein I, the Plaintiff should not be allowed to raise this issue now.

ARGUMENT II

THE PLAINTIFFS WERE NOT ENTITLED TO AN ORDER COMPELLING THE DEFENDANTS TO PAY THE SETTLEMENT AMOUNT A SECOND TIME, WHERE (1) PLAINTIFFS' MOTION FOR RELIEF WAS FILED BEYOND THE ONE YEAR PERIOD OF TIME ALLOWED BY MCR 2.612(C)(2), AND WAS THEREFORE UNTIMELY, (2) THE DEFENDANTS' RIGHTS WOULD BE DETRIMENTALLY EFFECTED IF THE ORIGINAL SATISFACTION OF THE SETTLEMENT WAS SET ASIDE, AND (3) THE PLAINTIFFS CANNOT MEET THE REQUIREMENTS NECESSARY FOR APPLICATION OF MCR 2.612(C)(1)(f).

A. Standard of Review

A trial court's decision on a motion to set aside a proceeding under MCR 2.612(C) is reviewed under the abuse of discretion standard. Vestevich v. West Bloomfield Tp., 245 Mich. App. 759, 630 N.W.2d 646 (2001); Trendell v. Solomon, 178 Mich. App. 365, 369-370, 443 N.W.2d 509 (1989).

B. Analysis

On the instant appeal, as in Bierlein I, this Court is asked to review a decision as to what relief, if any, should be granted for the alleged violation of MCR 2.420(B)(4). Although the Plaintiff claims that "the Michigan Court Rules do not provide specific guidance" for reviewing Plaintiff's allegation of error, this claim is clearly incorrect. In Bierlein I, the Plaintiff herself argued that this allegation of error must be resolved according to the standards set forth in MCR 2.612(C)(1), and it was those standards which the Court of Appeals applied in Bierlein I in order to determine what relief, if any, should be granted for the alleged violation of MCR 2.420(B)(4). Even more importantly, in Bierlein I, the Court of Appeals held that MCR 2.612(C)(1)(a) and (c) were applicable to Plaintiff's claims of mistake in paying the wrong party and misconduct. (Exhibit Q, p.

3). Nonetheless, the Plaintiff now attempts to ignore her previous stance and the Court of Appeals' previous ruling, and carefully avoids any reference whatsoever to MCR 2.612(C)(1).

As noted, the Plaintiffs fail to specify any portion of MCR 2.612(C)(1), or any other court rule, in support of their claim for relief. In Bierlein I, the Court of Appeals considered three possibilities:

(a) Mistake (MCR 2.612(C)(1)(a)).

(b) Fraud or other misconduct (MCR 2.612(C)(1)(c)).

(c) Any other reason justifying relief from the operation of the judgment (MCR 2.612(C)(1)(f)).

Pursuant to MCR 2.612(C)(2), a motion based upon any MCR 2.612(C)(1)(a)-(c) must be filed within one year after the judgment, order or proceeding was entered. In the instant case, Plaintiff's motion to re-open the settlement, and to set it aside, was untimely. As indicated in the Statement of Facts contained in this brief, it was not until March 5, 2002 that the Conservator filed a Motion to Re-Open the Trial Court Proceedings and to Re-Evaluate the Settlement Terms. (Exhibit N). Additionally, it was not until August, 2004 (more than seven months following the remand which resulted from Bierlein I) that the Plaintiffs once again sought to vacate Defendants' previous satisfaction of the settlement,[1] and to compel the Defendants to pay the settlement a second time. The deadline specified by MCR 2.612(C)(2) therefore expired long before the Plaintiff sought any relief from the court approved settlement. Importantly, MCR 2.612(C)(2) does not give the trial court any discretion in this regard. Rather, the rule is quite specific in stating that the motion "must be made" within one year. Given the undisputed fact that Plaintiff's motion was filed well beyond

1 Defendants' satisfaction of the settlement was implicitly set aside when the lower court entered the June 21, 2002 order reopening the settlement.

that time, the trial court had no discretion to grant Plaintiff's motion to compel the Defendants to pay the settlement a second time.

Quite apart from the above, in Bierlein I the Court of Appeals emphasized the unfairness of setting aside Defendants' satisfaction of the settlement (which the Plaintiff implicitly sought in the lower court, and now seeks in this Court) as follows:

> "**[D]efendants' rights would be detrimentally affected if the original satisfaction is set aside** since they relied on the court approved settlement for almost five years and have paid $55,000 to Samantha's next friend and attorney based on that court approval." (Exhibit Q, at p. 3)(emphasis added).

The Court of Appeals further noted that the result which the Plaintiffs now complain of were a result of the Plaintiff next friend's own actions:

> "The settlement here was on the record, the judge approved it, and the next friend agreed to the amount. Plaintiff was aware at that time that a conservator had not been appointed, and yet she still agreed to the settlement. When a party's own actions caused the result, courts are reluctant to grant that party relief under 2.612(C)(1)(f)." (Exhibit Q, at p. 3).

These observations are just as valid on the instant appeal as they were in Bierlein I.

Just as importantly, however, the precise arguments being raised by the Plaintiffs on the instant appeal were recently rejected by the Court of Appeals in another case, as well as Bierlein I. The case of Makeya Miller v. Kwame Levelle Molette, 2003 WL 21186587 (Mich App 2003)(attached hereto as Exhibit U) was essentially on all fours with the instant case. Like the instant case, the Miller case was a personal injury action, arising out of an automobile accident. The minor-plaintiff was approximately four years old at the time of her injury in the accident. The lawsuit was filed on her behalf, and was ultimately settled for $85,000.00. The settlement was approved by the trial court, and the Defendants issued a check in settlement amount, made payable to

the child's Guardian and the child's attorneys. The child's Guardian never attained Conservator status, because she failed to pay a $50,000.00 bond.

When the Plaintiff-Minor attained the age of majority, she learned that "no money existed." She filed a motion to re-open the file, and to vacate the satisfaction of the consent judgment, on the basis that the Defendants had tendered payment to the wrong party. Specifically, like the Plaintiff in the instant case, the Plaintiff in Miller claimed that the Defendants tendered the payment to her Guardian in violation of former MCR 2.420(B)(3), which allegedly required the payment to be tendered to the Conservator only. Although the Plaintiff challenged the validity of the Consent Judgment, she also sought an order for the Defendants to comply with the Judgment and pay her the settlement amount with interest. The Defendant opposed the motion, contending that they had satisfied the settlement properly and that they were under no duty to independently verify the probate proceedings in the underlying case. The Defendants further argued that it was the sole responsibility of the Guardian and Plaintiff's counsel to ensure that the proper legal steps were taken prior to the entry of the Consent Judgment and the settlement payment. It was also the position of the Defendants that the settlement payment was deposited into the client trust account of Plaintiff's own attorneys, and that the proper distribution of the funds became their sole responsibility. Finally, the Defendants maintained that Plaintiff's remedy lay in a claim of legal malpractice against her former attorneys.

The trial court denied Plaintiff's motion on the basis that the Plaintiff was barred from simultaneously challenging the validity of the Judgment and seeking to enforce that same Judgment. The Plaintiff subsequently filed a Motion for Relief from the trial court's order, on the basis that her original motion intended only to challenge the Satisfaction of Consent Judgment, but in the alternative to vacate the Consent Judgment pursuant to MCR 2.612(C)(1)(a) and (f), and to enforce

the mediation award which had previously been entered upon an appointment of a Conservator. The Plaintiff claimed that the original payment should be construed as non-payment on the basis that it failed to satisfy the Judgment pursuant to former MCR 2.420(B)(3). The trial court granted this motion on the basis that the payment was made in violation of former MCR 2.420(B)(3), and ordered the Defendants to repay that portion of the settlement, which was in excess of the Plaintiff's attorney fees and costs. The trial court also gave the Defendants a credit of $5,000.00, for that portion of the settlement amount which they were entitled to pay directly to the minor-plaintiff.

On a Motion for Reconsideration, the Defendants argued that Plaintiff's Motion to Set Aside the Satisfaction of the Judgment was untimely, because it was filed more than one year after the Judgment, in violation MCR 2.612(C)(2). The trial court denied this Motion for Reconsideration.

On appeal, the Court of Appeals reversed the trial court. The Court of Appeals noted that Plaintiff's Motion for Relief from Order could only have been considered under the provisions of MCR 2.612(C)(1)(a)-(c) and (f). The Court of Appeals also held that to the extent the Plaintiff was relying upon subsections (a)-(c) of MCR 2.612(C)(1), the Motion for Relief from Order was time-barred pursuant to MCR 2.612(C)(2) because the motion was not filed within one year after the proceeding was entered. The Court of Appeals further held that the language of MCR 2.612(C)(2) does not carve out any exception for minors.

The Plaintiff also claimed, however, that she was entitled to relief from the settlement order pursuant to MCR 2.612(C)(1)(f), which allows a trial court to relieve a party from a judgment, order or proceeding for "[a]ny other reason justifying relief from the operation of the judgment." The Court of Appeals held that, in order to receive relief from a proceeding under this subsection, three requirements must be met: (1) the reason for setting aside the judgment must not fall under subsections (a)-(e), (2) the substantial rights of the opposing party must not be detrimentally effected

if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the Judgment in order to achieve justice. Miller, supra. In support of these requirements, the Court of Appeals cited the cases of Heugel v. Heugel, 237 Mich App 471, 478-479, 603 NW2d 121 (1999) and Altman v. Nelson, 197 Mich App 467, 478, 495 NW2d 826 (1992).

The Court of Appeals concluded that the Plaintiffs failed to satisfy any of these elements. With regard to the first requirement, the Court of Appeals held that the Defendants alleged payment to the wrong party arguably fell within MCR 2.612(C)(1)(a), thus barring any relief under subsection (f).

Secondly, the Court of Appeals noted that the Defendants rights would be detrimentally effected if the original satisfaction of the settlement was set aside. The Court also noted that there was no evidence that the funds had been improperly applied. Of particular importance to this case, the Court of Appeals stated that "we are not persuaded that Plaintiff provided the trial court with any proof to support her argument that Defendants had the legal duty to ensure that [the Plaintiff's Guardian] properly effectuated her status as Conservator." Miller, supra. As support for this, the Court of Appeals cited Dean & Longhofer, Michigan Court Rules Practice, section 2420.4, page 588, where the authors indicated that it was incumbent upon the attorney for the minor to take the additional steps to make sure that a conservator was appointed. Miller, supra.

Finally, the Court of Appeals held that the Plaintiff failed to demonstrate any extraordinary circumstances entitling her to relief. The Court noted that the Plaintiff was not without an adequate remedy at law, because she could still sue her attorneys for failing to fulfill their duty to secure the appointment of Conservator.

Accordingly, the Court of Appeals ruled that the trial court improperly vacated the original satisfaction of the Consent Judgment and improperly ordered Defendants to repay the Plaintiffs.

For all practical purposes, this case is on all fours with Miller v. Molette in all pertinent respects, and the rationale of Miller v. Molette is equally applicable to the instant case. Indeed, in Bierlein I, the Court of Appeals applied precisely the same line of reasoning to the instant case. The Plaintiff cannot obtain relief under 2.612(C)(1)(a)-(c), because Plaintiff's motion for relief was untimely. Moreover, the Plaintiff cannot meet all three requirements necessary for application of MCR 2.612(C)(1)(f). Finally, as in the case of Miller v. Molette, the Plaintiff has not provided this Court, the Court of Appeals or the trial court with any evidence to support the argument that the Defendants had the legal duty to ensure that Plaintiff's counsel properly fulfilled his obligation to secure the appointment of a Conservator.

None of the cases cited by the Plaintiffs supports their claim that the Defendants had either the right or obligation to withhold payment until the probate court appointed a conservator. In the case of Commire v. Automobile Club of Michigan, 183 Mich App 299, 454 NW2d 248 (1990), the claimant did not file suit prior to the settlement. It is quite clear from the Court of Appeals' opinion that this settlement took place prior to any suit being instituted. Moreover, there is no indication that a conservator or next friend was ever appointed for the child, nor is there any evidence whatsoever that the settlement was approved by any court. Accordingly, application of MCR 2.420 simply was not at issue in Commire, for the obvious reason that MCR 2.420 only applies to cases that are in suit. In short, the Commire decision has no relevance to the instant case.

The case of Smith v. YMCA of Benton Harbor, 216 Mich App 552, 550 NW2d 262 (1996) is similarly irrelevant to the instant case. Once again, as in Commire, the settlement in Smith took place prior to any litigation being instituted, and there is no indication of any next friend (let alone a conservator) being appointed prior to the settlement. As in Commire, application of MCR 2.420 was not at issue. Similarly, as in Commire, there is no suggestion that the settlement was ever subjected

to court approval. The issue in Smith was not whether the defendant properly paid the settlement prior to appointment of a conservator. Rather, the issue was whether the settlement was valid at all. More specifically, the issue was whether or not a parent has authority to enter into a valid and binding settlement for his or her child, absent court approval of the settlement. The Court of Appeals ultimately held that court approval is required for such a settlement. The Court of Appeals did not hold that, after the court has approved the settlement, the payor has the right or obligation to delay payment until after a conservator has been appointed. Unlike the situation in Smith, the Plaintiff minor in the instant case was at all times represented by a next friend, and the settlement was approved by the lower court after a hearing. In short, the holding in Smith has no applicability to the facts of this case.

The case of In Re: Contempt of Auto Club Insurance Association, 243 Mich App 697, 624 NW2d 443 (2001) does not at all support Plaintiff's argument that the lower court should have vacated Defendants' satisfaction of the settlement, and compelled the Defendants to repay that settlement. In that case, the Court of Appeals never held that the settlement payor had the obligation to ensure that a conservator was appointed for the minor. Moreover, the Court of Appeals did not hold that the payor had the right or obligation to withhold payment until a conservator was appointed. Instead, the Court of Appeals merely stated its belief that Plaintiff's next friend had the obligation to open a probate estate. Significantly, the Court of Appeals did not approve of the insurer's insistence upon delaying payment until after the appointment of a conservator. Rather, the Court of Appeals characterized the case as one where "the lawyers' zest for legal combat overwhelmed their common sense," and where both the payor and Plaintiff's counsel were "stubborn." In Re: Contempt of Auto Club Insurance Association, supra, at 699. In short, although the Court of Appeals stated that the insurer's legal position was legally correct, the Court of Appeals

stopped short of holding that the insurer had the right or obligation to withhold payment pending appointment of a conservator. Instead, the Court of Appeals was merely making the point that the insurer was legally correct in its position that the next friend had the obligation to seek appointment of a conservator.

Finally, the case of Bowden v. Hutzel Hospital, 252 Mich. App. 566, 652 N.W.2d 529 (2002) is both factually and legally distinguishable from the facts of this case. Moreover, in Bowden, the Court of Appeals was not asked to address the issue raised by the Plaintiffs on the instant appeal. In Bowden, unlike the instant case, the plaintiffs claimed that the trial court had failed to conduct a hearing to determine whether the proposed settlement was in the best interests of the minor child. By contrast, in the instant case, the trial court did in fact hold such a hearing, as discussed in Appellee's Counter-Statement of Facts. Furthermore, the Plaintiffs in this case have never presented any evidence that the settlement was not in the child's best interests. Indeed, the Plaintiffs themselves concede that this issue "is now at rest." (Application for Leave to Appeal, p. 8). The thrust of the instant appeal is that Plaintiffs' original counsel stole the settlement money, and the Plaintiffs want the Defendants to pay the settlement a second time. Unlike Bowden, there is no question here as to whether the settlement was in the child's best interests.

Furthermore, in Bowden, the child's guardian withdrew his approval of the settlement before it was approved by the court, and discharged plaintiff's counsel. Apparently refusing to heed the wishes of his client, and with the court's knowledge that the plaintiffs wished to have new counsel, plaintiff's original counsel nonetheless proceeded with a motion to have the settlement approved. The court granted the motion for approval of settlement, without any hearing. Based upon the facts recited in the Bowden, the defendants in that case should have been fully aware of the plaintiffs' withdrawal of approval of the settlement, and their desire for new counsel. There is no indication

that the defendants ever paid the settlement. The plaintiffs in Bowden were not asking that the defendants be required to pay the settlement a second time. Accordingly, the defendants in Bowden could make no credible claim of detrimental reliance. All of these facts are in marked contrast to the instant case. In the instant case, the Plaintiff's mother never withdrew authorization for the settlement, but in fact appeared in court in order to support approval of the settlement. Furthermore, the Defendants in this case paid the settlement amount long ago, and would therefore be unfairly prejudiced if they were required to pay the settlement again.

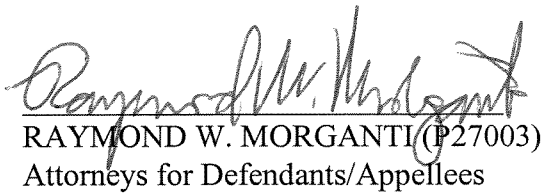
In light of the above, the Plaintiffs have failed to present appropriate factual and legal support for the relief they request. The lower court and Court of Appeals properly refused to set aside Defendants' satisfaction of the settlement, and properly reinstated the dismissal of this matter.

RELIEF

For all of the foregoing reasons, Defendants/Appellees pray that this Honorable Court issue an order denying Plaintiffs/Appellants' Application for Leave to Appeal.

Respectfully submitted,

SIEMION, HUCKABAY, BODARY, PADILLA, MORGANTI & BOWERMAN, P.C.

By: 

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